Edward Goh Geok Seng v Dunstan Dumpangol & Ors (No 2)

HIGH COURT (KOTA KINABALU) – CIVIL SUIT NO K346 OF 1988
MOHAMAD NOOR J
12 NOVEMBER 1988

Civil Procedure – Interlocutory injunction – Application for – Serious question to be tried on validity of appointment of directors and equity structure – Where balance of convenience lay – Unreasonable delay on plaintiff's part in bringing action – Contradictions in plaintiff's assertions – No explanation given by plaintiff

This was an application by the plaintiff under O 29 r 1 of the Rules of the High Court 1980 for an interlocutory injunction to restrain: (a) certain defendants from acting as directors of the ninth defendant; (b) certain defendants from disposing of their shareholdings in the ninth defendant; (c) certain defendants from dissipating any proceeds of sale from logging operations undertaken by them. The ninth defendant was a company engaged in logging operations and initially, the first, third and fourth defendants were appointed its directors but subsequently, an internal struggle to gain control of the company began when certain directors resigned and were replaced by the second defendant and the plaintiff and new directors were added in. The internal struggle continued which culminated in the institution of various suits.

In his application, the plaintiff contended that the defendants had control over the proceeds from the sale of the timber extracted and unless they were restrained, the proceeds would be dissipated and there would be no point for the plaintiff to continue with the suits. On the other hand, the defendants asserted that the plaintiff, by such application, was trying to get control of the company by restraining all the directors except himself and by so doing, the company would not be able to function at all. The defendants also alleged that the plaintiff lied on a few issues and that there was unreasonable delay on his part in bringing the action.

Held, dismissing the defendants' application:

(1) Injunction is pre-eminently a discretionary remedy. In the present case, having scrutinized the plaintiff's affidavit, the court is satisfied that there are serious questions to be tried, that is, on the validity of appointment of directors and the restructuring of their equity participation. As to the balance of convenience, taking into account all the existing circumstances, the balance lies in favour of the defendants.

(2) There was unreasonable delay of more than three months on the part of the plaintiff in bringing the action. The delay had not been satisfactorily explained by the plaintiff. Further the plaintiff had not come to this court with clean hands; in his statutory declaration he clearly stated that 'Locked Bag 67' was his address whereas in his affidavit, he denied that 'Locked Bag 67' was his. He did not at any time explain such contradiction.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 562 of 1988.]

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] 1 All ER 504 (folld)
2 *Fellowes* v *Fisher* [1975] 2 All ER 829 (folld)

Legislation referred to

Rules of the High Court 1980 O 29 r 1

Yapp Hau Pehn for the plaintiff.
KY Sim for the defendants.

Cur Adv Vult

Mohamad Noor J: This is an application by the plaintiff under O 29 r 1 of the Rules of the High Court 1980, seeking, inter alia, the following orders:

(a) to restrain the first, second, sixth, seventh and eighth defendants from acting as directors of the ninth defendant;
(b) to restrain the first, second, third, fourth, fifth and sixth defendants from disposing of, charging or otherwise encumbering their respective purported shareholdings in the ninth defendant or from voting at any general meeting of the ninth defendant either by themselves or by proxies;
(c) to restrain the first, second, third, fourth, fifth, sixth, seventh and eighth defendants from disposing of or otherwise dissipating any proceeds of sale of logs from logging operations which may have been undertaken by them;
(d) that all moneys received by any of the defendants from any sale of logs extracted from certain forest area be paid into court forthwith.

A brief background of the ninth defendant is as follows:

(1) the company was incorporated on 23 February 1982 mainly to engage in logging operations with an authorized capital of $25,000 and paid-up capital of $10,000. On 5 August 1985, the first, third and fourth defendants were appointed as its directors. About eight months later (as alleged), the third and fourth defendants resigned and were replaced by the second defendant and the plaintiff. Then, the internal struggle to gain control of the company began. At the extraordinary general meetings of the company on 17 October 1987 and 23 November 1987, the number of shares at $1 each was increased from 10,000 to 62,500 and the equity holding of each director was restructured. Consequently, the sixth, seventh and eighth defendants (Japanese nationals) were brought in as directors. The third and fourth defendants were purportedly re-appointed as directors. However, on 29 December 1987, the plaintiff obtained an injunction, inter alia, to restrain the third and fourth defendants from acting as directors. On 8 February 1988 (as alleged), the first defendant resigned and one, Joseph Wong Hin Tung, was appointed in his place. As alleged, about one month later, the second defendant was removed as director. The internal struggle continued which culminated in the institution of the relevant suits. It appears that the defendants are now in control of the company;

(2) the assets of the company and its activities are centred on the timber extraction agreement of 14 February 1986 whereby the Sabah Forest Industries Sdn Bhd engaged the company to extract timber logs from Ulu Padas, Sipitang area. However, the agreement had been terminated on 18 July 1988 due to the company's poor performance;

(3) the company is presently saddled with a $4.5m loan from Kaines (UK) Ltd, a company incorporated in the United Kingdom (per exhs EG29, EG30 and EG31 in the plaintiff's volume).

Briefly, the plaintiff contends that the defendants have control over the proceeds from the sale of timber extracted. And unless the defendants are restrained accordingly, the said proceeds would be dissipated and there would be no point anymore for the plaintiff to continue with the suits. Therefore, the balance of convenience should be in favour of the plaintiff. Whereas, in a nutshell, the defendants asserted that the plaintiff by such application was trying to get control of the company by restraining all the directors except himself. By so doing, the company would not be able to function at all, inter alia, to meet its obligation under the loan agreement, which ultimately, the company and its directors would suffer irreparable damage. The defendants further asserted that the plaintiff lied on a few issues and that there was unreasonable delay on the part of the plaintiff in bringing the action. Therefore, the plaintiff's application should be dismissed.

The principles governing the exercise of discretion to grant or refuse an interlocutory injunction are well established. Injunction is pre-eminently a discretionary remedy. The principle established in *American Cyanamid's* case[1] is fairly summarized by Sir John Pennycuick in *Fellowes* v *Fisher*[2] at p 843 as follows:

(1) Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case.

(2) The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.

(3) 'As to that' the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted.

(4) If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse.

(5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance should this otherwise be even, being preservation of the status quo. By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief.

(6) Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

In the present case, having scrutinized the plaintiff's affidavit, the court is satisfied that there are serious questions to be tried, that is to say, on the validity of appointment of directors and the restructuring of their equity participation. The next thing to consider is whether the balance of convenience lies in favour of granting or refusing interlocutory relief. In considering where this balance lies in this case, the first question to be asked is: if the plaintiff succeeds at the trial would he be adequately compensated by damages for any loss caused by the refusal to grant the relief? In my view, the answer is no by reason of the company's commitment to a loan of $4.5m and the termination of the timber extraction agreement which is its only known source of income. The next question is whether the defendants would be adequately compensated under the plaintiff's undertaking as to damages. In my opinion, the answer should also be in the negative having regard to the poor financial standing of the plaintiff. It is evidently clear from exhs WWH10 and WWH11 in the defendants' volume that the plaintiff is facing bankruptcy proceedings which has not been withdrawn and that of his indebtedness to Sabah Bank Bhd. Then, the court has to consider all other matters relevant to the balance of convenience, bearing in mind the need to preserve the status quo. The effect of granting the injunctions sought for would be that the company would not be able to function effectively since the plaintiff alone would be the remaining director. This would be a further blow to the company in the face of its timber extraction agreement having been terminated and the possible forfeiture of deposit of $2m under cl 11(2) of the agreement (per exh DD1 in the defendants' volume). Its other business activities would certainly be crippled and its financial position would surely be weakened. Its employees would be seriously affected and it would not be able to service its loan with Kaines (UK) Ltd, and ultimately the sixth and seventh defendants, the guarantors in respect of the said loan, would suffer. In the final analysis, I conclude that it is better to let the company survive rather than kill it because to do otherwise the defendants would suffer greater hardship than the plaintiff. Hence, my view is that the balance of convenience lies in favour of the defendants.

There was unreasonable delay of more than three months on the part of the plaintiff in bringing the action. According to para 13 of the plaintiff's affidavit, he knew of the alleged wrongdoings of the defendants on 8 March 1988, but filed the action only on 23 June 1988. The

delay had not been satisfactorily explained by the plaintiff. Further, the plaintiff had not come to this court with clean hands. In his statutory declaration dated 2 April 1986 (per exh DD30 in the defendants' volume) he clearly stated that 'Locked Bag 67' was his address, whereas in his affidavit dated 23 January 1988 (per exh DD29 in the defendants' volume, para 8) he denied that 'Locked Bag 67' was his. He did not at any time explain such contradiction.

Therefore, the plaintiff's application is dismissed with costs to be in the cause.

Application dismissed.

Solicitors: *Wong Yapp Chung & Co*; *Yong & Chia Co.*

Reported by *Ng Sheau Jiuan*

Sungei Way Leasing Sdn Bhd v Lian Seng Properties Sdn Bhd & Ors (Bank Bumiputra Malaysia Bhd & Anor, Interveners)

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C3889 OF 1986
SHANKAR J
5 MARCH 1988

Land Law – Property charged to bank in consideration for loan granted – Air-conditioning equipment installed on property subsequently – Lease agreement of air-conditioning equipment stated plaintiffs were to be owners of equipment – Dispute between plaintiffs and property owners – Bank intervened in proceedings – Claim by bank that they had prior interest in equipment and were entitled to sell equipment to discharge loan – Whether equipment was part of bankers' security – Equity under s 28(2) of Civil Law Act 1956 – Application to present case – Civil Law Act 1956, s 28(2)

The first defendant was the owner of a commercial/residential complex known as KL Plaza. To finance the development of the complex, the first defendant took a loan from the interveners (the bankers) which was secured by three charges in favour of them. Some air-conditioning equipment were installed in the complex and this equipment was the subject of a written lease between the plaintiffs and the first defendant. (The second, third and fourth defendants were the guarantors under this agreement.) By virtue of art 11 of the lease agreement, the plaintiffs were to be regarded as the owners of the equipment and the first defendant could not pass title to the equipment to a third party.

Subsequent problems arose and the plaintiffs filed a suit against the defendants. Thereafter the plaintiffs applied ex parte for a mandatory injunction to permit them to remove the equipment. The defendants made a cross-application for an injunction to prevent the plaintiffs from interfering with the equipment contending that the equipment was custom-made for KL Plaza and that it could not be removed without causing substantial damage to the building. The plaintiffs then filed an application for summary judgment seeking an order that the first defendant deliver up possession of the equipment. The intervener then applied to intervene in these proceedings, claiming that they had a prior interest in the equipment and were entitled in all the circumstances to have the equipment sold with the land to apply the proceeds towards the discharge of that loan.

Held, dismissing the intervener's application:

(1) This is a case where the first defendant as owner of the land had agreed in writing with the plaintiffs that ownership in the equipment, although attached to the land, was not to pass but to remain in the plaintiffs. When the land was charged, the equipment was not there. In other words, the equipment was not a part of the bankers' security.

(2) Under s 28(2) of the Civil Law Act 1956, there is an equity which gives a person who makes a bona fide improvement to land, without intending that it should gratuitously benefit a third party, the right if justice so requires to have the value of that improvement restored to him. The actual order required in such cases would depend on the circumstances.

(3) In the present case, the bankers cannot insist, as they are doing, that the plaintiffs must surrender to them the value of their equipment which is in the premises. The only equity which the bankers can claim is that the plaintiffs cannot damage the premises whilst removing the equipment.

[*Editorial Note*: The intervener appealed to the Supreme Court vide Civil Appeal No 374 of 1988. The Supreme Court (comprising Lee Hun Hoe CJ (Borneo), Abdoolcader and Gunn Chit Tuan SCJJ) allowed the appeal on 18 April 1989.]

Cases referred to

1 *Wiggins Teape (M) Sdn Bhd* v *Bahagia Trading Sdn Bhd*; *The East Asiatic Co Ltd & Ors as Objectors* [1980] 2 MLJ 45 (distd)
2 *Khoo Hock Leong* v *Lim Ang Kee* (1888) 4 Ky 353 (folld)
3 *Kassim bin Arippin* v *Mohamed bin Ramlan* [1971] 1 MLJ 87 (folld)
4 *Wee Kang Whye & Anor* v *Lee Woon Tong* [1974] 1 MLJ 7 (folld)
5 *Mok Deng Chee* v *Yap See Hoi & Ors* [1981] 2 MLJ 321 (folld)

Legislation referred to

Civil Law Act 1956 s 28(2)

Lee Min Choon for the plaintiffs.
Yeoh Siok Kee (*Jonathan Puthucheary* with him) for the defendants.
Vijaya Kumar for the interveners.

Cur Adv Vult

Shankar J: Along Jalan Bukit Bintang Kuala Lumpur is a well-known commercial/residential complex described as KL Plaza. This complex is built on a block of land which is made up of the land comprised in the documents of title CT No 17922 up to CT 17960 (inclusive) and CT No 13554 up to CT 13557 (inclusive). This land belonged to Lian Seng Properties Sdn Bhd ('Lian Seng'), the first defendant herein. To finance the development Lian Seng borrowed M$52m from Bank Bumiputra Malaysia Bhd and Bumiputra Merchant Bankers Bhd ('the bankers').